TAN SRI DATO PADUKA (DR) TING PEK KHING

v.

HII CHANG PEE (NO 2)

HIGH COURT SABAH AND SARAWAK, MIRI
SULAIMAN DAUD J
[SUIT NO: 22-43-98(MR)]
28 FEBRUARY 2003

CIVIL PROCEDURE: *Discovery - Application for - Discovery of statement of account - Whether statement of account relevant to fair determination of case*

This was the defendant's appeal against the decision of the learned deputy registrar disallowing the defendant's application for an order that the plaintiff makes and files an affidavit stating whether he had, at any time, possession of his statement of account in Hock Hua Bank from 1 June 1994 to 31 March 1995. The plaintiff had claimed against the defendant the total sum of RM100,000,000 as damages in respect of an alleged libel contained in a police report lodged by the defendant, and published by the defendant in a press release which was republished in several newspapers. The defendant, who entrusted a cheque of RM200,000 to the plaintiff, alleged that the plaintiff had banked the said cheque into his own account at Hock Hua Bank, and that in doing so, the plaintiff had committed an offence of criminal breach of trust and/or cheating. The plaintiff admitted retaining and banking the said cheque into his personal account, but averred that this was done on the advice of the YAB Chief Minister. The defendant further contended that the discovery of the statement of account was necessary for disposing fairly the defence of justification pleaded by the defendant in relation to the alleged libel.

Held:

[1] On the facts, the withholding and the banking in of the said cheque by the plaintiff were not even disputed. The actual facts in dispute were, firstly, whether the withholding of the said payment was made on the advice of the YAB Chief Minister, and secondly, whether the said cheque was banked into the plaintiff's personal account with the knowledge of the defendant. Therefore, the plaintiff's statement of account with Hock Hua Bank for

the period specified in the application was not at all relevant to the defendant's pleaded particulars, as the discovery of the statement of account in question was not essential to the just determination of the real issues between the parties. (pp 559 h & 560 a)

[Appeal dismissed.]

Case(s) referred to:
Compagnie Financiere et du Padfique v. Peruvian Guano Co [1882] 11 QBD 55 ***(refd)***
Evans v. Granada Televisions Limited [1996] EMLR 429 ***(refd)***
Gourley v. Plimsol [1873] LR 8 CP 362 ***(refd)***
McPhilemy v. Times Newspaper Ltd & Ors [1999] 3 All ER 775 ***(refd)***
Metropolitan Saloon Omnibus v. Labouchere [1893] 2 QB 183 ***(refd)***
The Consul Corfitzon [1917] AC 550 ***(refd)***
Wright v. Times Business Publications Ltd & Anor [1991] 3 MLJ 12 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1993] MLJU 96 ***(refd)***
Yorkshire Provident Life Assurance Company v. Gilbert & Rivington [1895] 2 QB 148 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 24 rr. 1(1), 2(1), 7, 8

For the plaintiff - Dato' VK Lingam (Victor Wong); M/s Victor Wong & Chiew
For the defendant - Karpal Singh (Fabian Lim, Orlando Chua & Lim Heng Choo); M/s Lim & Lim

Reported by Suresh Nathan

JUDGMENT

Sulaiman Daud J:
This is the defendant's appeal to the judge in chambers against the decision of the learned deputy registrar disallowing the defendant's application for an order that the plaintiff do make and file an affidavit stating whether he has or has at any time had in his possession, custody or power the documents as prayed for in prayer (1) and 2 of the defendant's summons in chambers dated 9 April 2000, namely:

(1) the plaintiff's statement of account in Hock Hua Bank Miri Account No. 1579-2 from 1 June 1994 to 31 March 1995;

(2) the Hock Hua Bank Cheque No. 447918 for RM200,000 and the relevant bank accounts and bank statements of Woodhouse Sdn Bhd and/or the plaintiff showing payment of the said cheque.

However in the course of the hearing the parties have agreed to confine the appeal only to the documents referred to in (1) above. The said application is supported by the affidavit-in-support affirmed by the defendant on 31 March 2001. The plaintiff opposed the application and filed in his affidavit-in-reply which was affirmed on 25 May 2001.

The relevant facts for the purpose of this application may be stated as follows. By writ of summons dated 5 May 1998 the plaintiff claims against the defendant in the total sum of RM100,000,000 as damages in respect of an alleged libel contained in a police report lodged by the is defendant on April 1998 and that published by the defendant in a press release dated 18 April 1998 which was republished in several newspapers.

In that police report and press release the defendant said that on 23 June 1994 he issued a Bank Utama (M) Bhd cash cheque no. 888346 in the sum of RM200,000 ("the said cheque") to Lembaga Amanah Masjid Lingga ("the Lembaga") and entrusted the same to the plaintiff. On about 8 March 1995 one YB Julaihi b Nawawai made an acknowledgement of receipt of the RM200.000 from Tan Sri Ting Pek Khiing by Hock Hua Bank Berhad cheque no. 447918. The defendant alleged that the plaintiff had banked his original cheque into his own account at Hock Hua Bank Miri Account No. 1597-2, the subject matter of the present application, on 24 June 1994. In so doing the defendant believed that that the plaintiff has committed an offence of criminal breach of trust and or cheating.

It is the plaintiff's pleaded case that the words so published in their natural and ordinary meaning meant and were understood to mean that the plaintiff had dishonestly misappropriated the said sum of RM200,000 for himself with the intention of permanently depriving Masjid Lingga and the defendant, of the proceeds, and that the plaintiff was accordingly guilty of criminal breach of trust and/or the criminal offence of cheating.

In his amended defence and counterclaim the defendant denied the words so published bore or were understood to bear the meaning as pleaded in the amended statement of claim. Further or alternatively the defendant pleaded justification in that the said words are true in the meaning.

The Law

Both the learned counsels enlightened the court on the relevant law applicable for the discovery of documents which I shall refer to. The rules governing the discovery of documents are provided in O. 24 of the Rules of the High Court 1980 ("the RHC"). Order 24 r. 1(1) and 2(1) of the RHC respectively provide

for mutual discovery and discovery by parties without orders of documents which are or have been in their possession, custody or power relating to matters in question in the action. Rule 7 thereof provides for the discretionary power of the court to make any order for discovery of particular documents, while r. 8 provides for the discretionary power of the court to dismiss, adjourn or refuse such an application if it is of the opinion such discovery is not necessary.

With regard to the meaning of the expression 'relating to matters in question in the action' as appearing in O. 24 r. 1(1) and (2) aforesaid Bret LJ in *Compagnie Financiere et du Padfique v. Peruvian Guano Co* [1882] 11 QBD 55 said at pp. 62-63:

> It seems to me that every every document relates to matters in questions in the action, which not only would be evidence upon any issues, but also which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences .. .

The authority was approved by the House of Lords in *The Consul Corfitzon* [1917] AC 550 at p. 553 and also followed in *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1993] MLJU 96 and *Wright v. Times Business Publications Ltd & Anor* [1991] 3 MLJ 12.

Mr Karpal Singh, for the defendant, also cited the case of *Gourley v. Plimsol* [1873] LR 8 CP 362 which draws the distinction between seeking documents for the purpose of looking for a case, not to support his defence, or see if he has a defence which can be supported and that to enable him to support the case thus presented. It is the learned counsel's contention that in the present case the defendant has pleaded the defence of justification and that the documents referred to in the present application is related to the cause or matter in the present action and are relevant to either party's case.

Mr Karpal Singh also drew the court's attention to the fact that the plaintiff did not dispute the fact that he banked the said cheque into his personal account. He contends that the bank statement sought is limited to the period between 1 June 1994 until 31 March 1995 only, being the period from payment in and the handing over of the said sum of RM200,000 to the Lembaga. The learned counsel argued that the bank statement is of obvious significance since it tends to advance the plaintiff's case if the account was very substantially in credit,

but if it transpired that the same was in debit and the credit urgently needed, or a similar sum was promptly paid out elsewhere, this would undoubtedly support the defendant's case.

According to the learned counsel the bank statement is directly relevant to the parties' respective pleadings. Firstly on the issue whether the defendant volunteered the donation as pleaded by the plaintiff an averred in para 9(1) of the amended statement of claim or that the defendant was approached by the plaintiff to convey the message of the YAB Chief Minister for the donation as pleaded in para. 8.2(1) of the amended defence and counterclaim. Further the learned counsel contends that such statement is also relevant in determining whether the plaintiff had used the money for his own purpose or treated the money as if it was his own, and whether or not he had also earned interest thereon or otherwise (see para. 8.2(20) of the defence).

Dato' VK Lingam, the learned counsel for the plaintiff, firstly reminded the court that this is a defamation action involving libel action and that the defendant also counterclaims against the plaintiff. The learned counsel referred to paras. 8 and 10 of the amended statement of claim and contends that the sting of the action is that the plaintiff had dishonestly misappropriated the said sum of RM200,000 for himself by paying the said cheque into his own bank account. He further pointed out that the plaintiff did not dispute the fact that he banked in the cheque into his personal account, but however averred that he did so when advised by YAB the Chief Minister of Sarawak to hold on the donation. It was further pleaded that the defendant had no objection to the plaintiff banking in the said cheque. Based on the matters pleaded the learned counsel submitted that said bank account is not relevant to the defendant's plea of justification.

The learned counsel also referred the court to several authorities on the proper approach to be taken in considering the application for discovery of particular documents. Such cases include *McPhilemy v. Times Newspaper Ltd & Ors* [1999] 3 All ER 775 CA, where on the proper approach to the conduct of libel actions, May LJ said at p. 791:

> As with all actions, libel actions, should, by proper case management, be confined within manageable and economic bounds. They should not descend into uncontrolled and wide-ranging investigations akin to public inquiries, where that is not necessary to determine the real issues between the parties. The court will, now ... strive to manage the case so as to minimise the burden of litigants of slender means. This include excluding all peripheral material which is not essential to the just determination of the real issues between the parties, and whose examination would be disproportionate to its importance to the issue .. .

The learned counsel also referred the court to the case of *Evans v. Granada Televisions Limited* [1996] EMLR 429 where it was held that a plaintiff was only obliged to give discovery in relations to the matters alleged in the defendant's particulars of justification. This was because the defendant was not entitled to a fishing exercise to see if some other defence could be found in the plaintiff's documents. Another case cited is *Yorkshire Provident Life Assurance Company v. Gilbert & Rivington* [1895] 2 QB 148 which followed the principle laid down in *Metropolitan Saloon Omnibus v. Labouchere* [1893] 2 QB 183, that the defendant is not entitled to an inspection of the plaintiff's book for the purpose of proving justification in action against him for libel to discourage and stop a fishing expedition.

I now turn to consider the merit of the present application. Put generally the question is whether the discovery is necessary for disposing fairly the defence of justification pleaded by the defendant. In other words whether the statement of account sought to be discovered is related to the matters put in issue by such defence. To answer the question it is necessary to examine the pleading of the parties in so far they relate to the point in issue.

It is not disputed that the defendant is relying on the defence of justification, the particulars of which are specifically pleaded in paras. 8 to 15 of the amended defence and counterclaim. That part of the defence that specifically relates to the allegation of dishonest misappropriation is particularised in para. 8.2(10) thereof which read:

> Instead of delivering the cheque to either Trust Board or otherwise ensuring that the cash was applied for the purpose for which it has been given to the plaintiff, without informing the defendant paid the cheque into his personal account No. 1579-2 with Hock Hua Bank, Miri on 24 June 1994 (one day after the cash cheque was given by the plaintiff to the defendant).

The plaintiff's reply thereto can be found in para. 3(e) of the "reply" where he admitted retaining the cheque and banking the same into his personal account. However the plaintiff averred that the cheque was not delivered to the Lembaga on the advice of the YAB Chief Minister, and that he banked in the same with the consent and knowledge of the defendant.

Having regard to the pleadings of both parties, and in particular to para. 8.2(10) of the amended defence and counterclaim and para. 3(e) of the reply above-mentioned, I cannot see how the discovery of the statement of account in question is essential to the just determination of the real issues between the parties. As can be seen the withholding and the banking in of the said cheque by the plaintiff were not even disputed. It appears to me the actual facts in dispute are firstly whether the withholding of the said payment is made on the

advice of the YAB Chief Minister, is and secondly whether the cheque was banked into the plaintiff's personal account with the knowledge of the defendant. I therefore agree with the plaintiff's contention that the defendant in making the present application is embarking on a 'fishing expedition'.

For the reason stated above, it is my finding that the plaintiff's statement of account with Hock Hua Bank for the period specified in the application is not at all relevant to the defendant's pleaded particulars. Accordingly I dismiss the appeal with costs to be taxed unless otherwise agreed.